3

APR 8 2003

CLERK

No. 02-1171

IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

TELECOR COMMUNICATIONS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT D. EDINGER
Counsel of Record
JONATHAN E. MILLER
LINDA G. KAUFMANN
EDINGER & BLAKLEY, P.C.
Attorneys for Respondents
Suite 3150, Oklahoma Tower
210 Park Avenue
Oklahoma City, OK 73102
(405) 232-3300

180084

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the federal "state action doctrine" applies under Oklahoma antitrust law and, if so, whether both lower courts erred in their fact-bound conclusions that the elements of the doctrine were not proven in this case.

2. Whether under Oklahoma law, both lower courts erred in their fact-bound conclusions that the damages awarded in this case were not clearly, decidedly, or overwhelmingly against the weight of the evidence.

3. Whether under Oklahoma law, the Tenth Circuit erred in holding that the relevant product market was properly defined from the perspective of the Location Owner customer (for whom it was undisputed that payphones were not interchangeable with cellphones), given the undisputed facts that it was the Location Owner (i) to whom payphone providers market their services and for whom payphone providers compete, and (ii) to whom access was denied to competitors as a result of SWBT's anticompetitive conduct.

RULE 29.6 STATEMENT

The following parties are respondents in this proceeding:

Advanced Communications, Inc.
Coinlink, L.L.C.
Jack Keeler, d/b/a Americall
Kenneth Meritt, d/b/a/ Oklahoma Heartland Payphone Services
Don Owens, d/b/a Owens Communications Co.
Payphone Plus, L.L.C.
Redlands Communications, Inc.
Sooner Telecommunications, Inc.
Telecor Communications, Inc.

None of the corporate respondents has a parent company and no publicly held company owns 10% or more of the stock of any such corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	vi
Introduction	1
Counter-Statement of the Case	2
A. Structure of the Payphone Market	2
B. Payphone Regulation and SWBT's Contractual Lock-Up and "Blitz"	3
C. The Effect of SWBT's Conduct on the Payphone Market and Plaintiffs' Damages	5
Reasons for Denying the Writ	7
I. The Petition Only Raises State Law Questions	7
II. Because The Federal State Action Doctrine Does Not Apply Under Oklahoma Law, The Question Raised By SWBT's Petition Is Moot	9

Contents

		Page
III.	The Tenth Circuit's Damage Decision Applies Settled Law And Does Not Create A Circuit Conflict	14
	A. SWBT's Damage Argument Challenges Fact-Bound Conclusions of the Lower Courts	15
	B. SWBT's Damage Argument Ignores Factual Grounds Supporting the Damage Awards	16
	C. The Tenth Circuit's Decision Is Not in Conflict with Other Circuits	18
	D. The Propriety of Injunctive Relief is Not Subject to Review	20
IV.	The Tenth Circuit's Decision Affirming The Relevant Product Market Definition Applied Settled Law To Undisputed Facts	21
	A. The Product Market Was Properly Defined at the Location Owner Level	22
	B. The Tenth Circuit's Decision Is Consistent with the Settled Principle that Antitrust Law Protects the *Competitive Process*, Not Particular Market Participants	25

Contents

Page

C. The Petition's Undeveloped Antitrust Injury Argument Does Not Merit Review 28

Conclusion 30

Appendix — Decision Of The Supreme Court Of The State Of Oklahoma Dated And Filed March 11, 2003 ..... 1a

TABLE OF CITED AUTHORITIES

CASES *Page*

AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216 (2nd Cir. 1999) 25

Alexander v. National Farmers Org., Inc., 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983) 27

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 27

Aspen Skiing Co. v. Aspen Highlands Skiing Co., 472 U.S. 585 (1985) 15

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 28

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 21

Bishop v. Wood, 426 U.S. 341 (1976) 8

Brown v. Pro Football, Inc., 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996) 27

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 22, 23, 26

Cited Authorities

Page

Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) 28, 29

Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261 (7th Cir. 1984) 28

Cass Student Advertising, Inc. v. National Educ. Advertising Serv., Inc., 516 F.2d 1092 (7th Cir.), *cert. denied*, 423 U.S. 986 (1975) 23

Central Telecomm, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) 19

City of El Paso v. Darbyshire Steel Co., Inc., 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979) 20

City of Springfield v. Kibbe, 480 U.S. 257 (1987) 20, 24, 29

Connecticut Importing Co. v. Frankfort Distilleries, Inc., 101 F.2d 79 (2nd Cir. 1939) 18

DeLong Equip. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186 (11th Cir.), *cert. denied*, 510 U.S. 1012 (1993) 18

DSC Comm. Corp. v. Next Level Comm., 107 F.3d 322 (5th Cir. 1997) 21

Cited Authorities

Page

Essential Comm. Systems, Inc. v. AT&T, 610 F.2d 1114 (3rd Cir. 1979) 14

Fine Airport Parking, Inc. v. City of Tulsa, 2003 OK 27, __P.3d __(2003) 8, 10, 11

Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986) 28

Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957) 18

FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) .. 13

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 16

Harolds Stores, Inc. v. Dillard Dept. Stores, Inc., 82 F.3d 1533 (10th Cir.), *cert. denied*, 519 U.S. 928 (1996) 7-8

Illinois v. Gates, 462 U.S. 213 (1983) 11, 29

Intergraph Corp. v. Intel Corp., 195 F.3d 1346 (Fed Cir. 1999) 25

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27 (1993) 11, 24

Jabat, Inc. v. Smith, 201 F.3d 852 (7th Cir. 2000) ... 20

Cited Authorities

Page

Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) 12

Leavitt v. Jane L., 518 U.S. 137 (1996) 8

Lightening Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3rd Cir. 1993) 18

Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948) 22-23, 27, 28

McCord v. Maguire, 873 F.2d 1271 (9th Cir. 1989) .. 14

Merrill Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986) 9

Moore v. Sims, 442 U.S. 415 (1979) 9

National Farmer's Org. v. Associated Milk Producers, Inc., 850 F.2d 1286 (8th Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989) 30

Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 745 F.2d 441 (7th Cir. 1984) 18

Omega Envt. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997) 25

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 21

Page

Phonetele, Inc. v. AT&T, 664 F.2d 716 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983) 14

Public Service Co. v. Corporation Comm'n, 918 P.2d 733 (Okla. 1996) 4

Roland Mach. Co. v. Dresser Indust., Inc., 749 F.2d 380 (7th Cir. 1984) 25

Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938) 8

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 16, 17, 30

Swift & Co. v. United States, 196 U.S. 375 (1905) 27

TEC Cogeneration, Inc. v. Florida Power & Light Co., 76 F.3d 1560 (11th Cir.), *modified on reh'g*, 86 F.3d 1028 (1986) 13

Three Affiliated Tribes v. Wold Eng'g, P.C., 467 U.S. 138 (1984) 9

Todd v. Exxon Corp., 275 F.3d 191 (2nd Cir. 2001) ... 23, 27

Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1292 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982) 27

Cited Authorities

Page

United Phosphorus, Ltd. v. Midland Fumigant, Inc., 205 F.3d 1219 (10th Cir. 2000) 16

United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) 22, 23

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001) 24, 25

United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975) 11

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 27

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 19

Cited Authorities

Page

STATUTES

15 U.S.C. § 26 21

OAC 165:58-1-11 4

Okla. Stat. tit. 79, § 205 21

Okla. Stat. tit. 79, § 212 7

Okla. Stat. tit. 17, § 139.1 12

Pub. L. 104-104, title vi., § 601(b)(1), 110 Stat. 56, 143 4

RULES

Fed. R. Civ. P. 16(e) 11

United States Supreme Court Rule 14.1(a) 11

OTHER AUTHORITIES

2 Areeda, Hovencamp & Blair, ANTITRUST LAW ¶ 348d1 (2000) 29

HERBERT HOVEMKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 16 (1999) 27

M. Handler, *Antitrust,* 78 Colum. L. Rev. 1363 (1978) 11

INTRODUCTION

Plaintiffs/Respondents (Plaintiffs) are nine payphone service providers in the deregulated Oklahoma payphone market who alleged that Defendant/Petitioner Southwestern Bell Telephone Company (SWBT) unlawfully maintained its monopoly and restrained trade in violation of federal and Oklahoma antitrust law. After a five-week trial, a jury found SWBT liable for violating *Oklahoma* antitrust law, but *not federal* antitrust law. *1/31/01 D.Ct. Order*, App. 78a.[1]

On appeal, SWBT did not challenge the evidence that it monopolized and restrained trade in the Oklahoma payphone market. Instead, it attempted to escape liability for its "highly successful" anticompetitive conduct by asserting, *inter alia*: (i) a market definition argument that ignored the undisputed facts regarding the relevant market; (ii) a federal "state action doctrine" defense which is inapplicable under Oklahoma law; and (iii) a challenge to the jury's fact finding regarding damages. After the Tenth Circuit rejected these arguments, SWBT paid the judgments and sought this Court's review.

SWBT's Petition does not raise a genuine federal question or any error of law. Instead, it begins with a faulty premise – that there is a conflict between the Tenth Circuit's decision (enforcing *Oklahoma* law) and decisions of other federal circuits (enforcing *federa*l law) – and proceeds to challenge a series of fact-bound conclusions concurred in by the jury and/or the two lower courts. This Court's usual practice is not to review the correctness of lower court interpretations of state law or to

---

1. Herein "App.__" refers to Petitioner's Appendix, "Resp. App.__" to Respondents' Appendix, and "SWBT-App__" and "Tel-SApp__" to Appellant's and Appellees' Tenth Circuit record submissions.

correct fact-bound errors. This case presents nothing exceptional to justify a departure from that practice.

COUNTER-STATEMENT OF THE CASE

In its attempt to justify this Court's review, SWBT grossly misstates the record.

A. Structure of the Payphone Market

The Tenth Circuit affirmed the District Court's summary judgment ruling that defined the product market based on the undisputed facts. *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F.3d 1124, 1132-33 (10th Cir. 2002), App. 18a. Chief among those undisputed facts was that payphone providers, like Plaintiffs and SWBT, market their services to upstream location owners (Location Owners) and compete with each other "in supplying payphones to [L]ocation [O]wners." *Id.* at 11a. To Location Owners, who desire payphones to entice traffic to their businesses (SWBT-App 1452), it was undisputed that cellphones are not interchangeable with payphones. *Telecor,* App. 19a.

SWBT challenges the Tenth Circuit's decision by recasting the market structure, ignoring relevant undisputed facts, and then alleging "improper fact-finding" by the lower courts. Pet. 10. SWBT's recast market focuses on downstream payphone end-users (who make payphone calls) and ignores upstream Location Owners (who want payphones installed). Yet SWBT admitted below that Location Owners are the "customer[s] of record" to whom payphone providers "market their payphones." (SWBT-App 0071, 1229). SWBT's anticompetitive conduct was designed to exclude competitors from access to Location Owner customers. *Telecor*, App. 79a. This conduct had the intended effect of allowing SWBT to reap monopolistic profits by paying Location Owners non-competitive commissions (on public

payphones), charging them supra-competitive fees (on semi-public payphones), and depriving them of competitors' better payphones and service. (SWBT-App 0330, 5856-58, 6441-42).

SWBT's Petition labels Location Owners as "distributors," but, as SWBT's economist admitted below, Location Owners are *not* "distributors." (SWBT-App 1876-77). Instead, Location Owners are consumers of payphone services and suppliers of payphone locations. (SWBT-App 0158, 1451). Finally, SWBT claims that payphone providers' "only source" of revenues is end-users, Pet. 3, but revenues also come from other sources, including Location Owners (semi-public fees) and other telephone companies (dial-around fees). (SWBT-App. 0158, 1920). Regardless of the source, payphone providers cannot earn *any* revenues without access to Location Owners.

B. Payphone Regulation and SWBT's Contractual Lock-Up and "Blitz"

The Tenth Circuit rejected SWBT's attempt to use the authority of the Oklahoma Corporation Commission (OCC) to shield it from liability, finding SWBT's "anti-competitive unilateral" conduct was not "regulated," "mandated, "authorized," "reviewed," or "even known about by the OCC." *Telecor*, App. 25a n.7, 26a. SWBT contests these findings by mischaracterizing its conduct and misstating the OCC's authority over and knowledge of that conduct.

In 1990, the Oklahoma legislature changed Oklahoma payphone policy "from monopoly to competition." *Id.* at 2a. As the sole provider of payphones until that time, SWBT had neither used nor needed to use long-term restrictive payphone contracts. (SWBT-App 6321-22, 3221, 3230; Tel-SApp 0421). However, when SWBT learned competition was coming, it began an "intentional campaign" before competitors arrived

(culminating in the "Blitz") to make "entry into the Oklahoma pay phone market more difficult by attempting to secure every possible pay phone location through long-term contracts" with Location Owners. *Telecor,* App. 3a. When competitors arrived in 1996, SWBT had the best locations locked-up with long-term restrictive contracts, effectively foreclosing competitors' entry into the market. (SWBT-App 6330, 6334-35, 6354-55).

Describing this case as the "paradigm of deregulatory transition," SWBT implies its contractual lockup and Blitz were condoned by OCC regulation. They were not. Instead, they were *voluntarily initiated outside the regulatory scheme* for the purpose of subverting the state's new pro-competition policy.[2] The only evidence below was that the OCC did *not* exercise control or supervision over SWBT's pre-November 1996 payphone contracting practices. (SWBT-App 2086). *See Public Service Co. v. Corporation Comm'n*, 918 P.2d 733, 739-40 (Okla. 1996) (OCC authority does not extend to approval of utility's contracts about to be entered into or to its management decisions).

In 1996, the OCC initiated a legislative rulemaking which *was intended* to "promote competition" and *was not intended* to "relieve . . . a payphone service provider from any of its duties" under Oklahoma law. App. 150a; OAC 165:58-1-11.

---

2. Federal regulatory policy is not implicated since this case involves enforcement of state antitrust laws and SWBT's claim that "deference" should be given to "state regulatory policy" under the state action doctrine. Pet. 4. Even so, the federal 1996 Telecommunications Act not only mandated payphone competition, it also insured enforcement of the antitrust laws, expressly providing that the Act should not be "construed to modify, impair, or supercede the applicability of the antitrust laws," nor should it be construed to supercede "state, or local laws unless expressly so provided . . . ." Pub. L. 104-104, title vi, § 601(b)(1), 110 Stat. 56, 143.

During the rulemaking, a "fresh look" rule was proposed that would have given Location Owners the opportunity to avoid existing payphone contracts and enter into contracts with competitors. The proposed rule was an "alternative to fact-finding" regarding the contracting practices of incumbents like SWBT. *Telecor*, App. 20a. The OCC made no fact-finding in the proceeding because no evidence was taken. The OCC could not have known about the effect of SWBT's contracts on the market because SWBT falsely represented to competitors that it "was not taking any extraordinary efforts to get contracts" and failed to disclose its "Blitz" to the OCC. (SWBT-App 4695, 4849). Most parties submitting comments during the rulemaking "vehemently opposed" the proposed rule, asserting that the OCC lacked the jurisdiction and evidentiary record to enact it, and that it was unconstitutional. App. 154a; *infra* n.8.

Faced with these objections, the OCC declined to take any action – neither enacting the proposed rule, nor endorsing SWBT's contracts. *Id.* The Tenth Circuit correctly found that an appeal from the OCC's "inaction" was not available under Oklahoma law, and that, in any event, "Plaintiffs [were] not complaining about anything the OCC did or did not do." *Telecor*, App. 26a.

C. The Effect of SWBT's Conduct on the Payphone Market and Plaintiffs' Damages

SWBT implies that its liability was based solely on its contracts and the Blitz. Pet. 8. It was not. The lower courts found that jurors could base SWBT's liability not only on its "whole system of contracts with exclusionary terms," but also on "an abundance of other anti-competitive conduct" designed "to freeze out competition . . . ." *Telecor,* App. 3a, 30a n.8. Jurors were allowed to base liability "on any one or more of" the various forms of anticompetitive conduct, including SWBT's

lockup contracts, its interference with Plaintiffs' relationships with Location Owners, its disparagement of Plaintiffs' products and services to Location Owners, and its refusal to deal with Plaintiffs in order to make it more difficult for Plaintiffs to compete. (SWBT-App 3478, 3481). Numerous Location Owners testified at trial about how SWBT's conduct obstructed their ability to choose competitors' superior payphone services (SWBT-App 5338-54, 6872-75).

While both lower courts found evidence to support the conclusion that SWBT's contracts alone "imposed substantial barriers to making a profitable entry" into the payphone market, the Tenth Circuit found that SWBT engaged in a variety of other conduct that raised the costs of its rivals and prevented Location Owners from switching to competitors, including "erecting a bureaucratic maze," "failing to remove its pay phones when requested to do so," and "damaging" locations when removing its payphones. *Telecor,* App. at 3a-4a, 4a n.2.

SWBT asserts that "plaintiffs successfully competed," suggesting its anticompetitive conduct had a minimal impact on the market. Pet. 8. But implicit in the jury verdicts is a finding that SWBT's conduct excluded competition and restrained trade, thereby injuring Plaintiffs in their business or property. (SWBT-App 3476, 3500, 3506). Through its exclusive contracts and array of other predatory tactics, SWBT protected its lucrative $30 million a year monopoly and excluded competitors from the market. (SWBT-App 6430). Although SWBT predicted before deregulation that open and fair competition would quickly erode its dominant market share and deprive it of 77% of its market revenues, its anticompetitive scheme enabled it to retain 87% of the market after two years of impeded competition. *Telecor*, App. 3a-4a. The resulting injuries to competition included not only the exclusion of competitors, but also the

imposition of technologically inferior payphones and payphone service, lack of choice, and non-competitive prices.

Both Plaintiffs and SWBT presented damage models to the jury which calculated Plaintiffs' damages by considering lost payphones resulting from SWBT's anticompetitive conduct. *1/31/01 D.Ct. Order*, App. 73a; (SWBT-App 8127). After being instructed that it could award past and future lost profits "because of defendant's *past unlawful conduct,*" and that it could not award "purely speculative damages," the jury returned general verdicts awarding Plaintiffs collectively $7,465,450, less than 27% of the amount requested under their damage model. *Telecor*, App. 31a. Both lower courts found sufficient evidence of past and future harm caused by SWBT's past unlawful conduct to support the damage awards. *Id.* at 30a-31a.

REASONS FOR DENYING THE WRIT

I. THE PETITION ONLY RAISES STATE LAW QUESTIONS

The Tenth Circuit affirmed jury findings that SWBT monopolized and restrained trade in violation of Oklahoma antitrust law. Because SWBT was found liable under state law, *the Tenth Circuit's judgment does not implicate federal law.* Nonetheless, SWBT urges as its *sole* justification for certiorari that there is a "conflict" between the Tenth Circuit's decision (enforcing Oklahoma law) and decisions of other circuits (enforcing federal law). Pet. 3. According to SWBT, the purported conflict arises because Oklahoma's antitrust statutes are to be interpreted "in a manner consistent with federal antitrust law." Okla. Stat. tit. 79, § 212. But, as case law illustrates, "consistent with" does not mean "identical to." *See Harolds Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1550 (10th Cir.) (Oklahoma antitrust law is similar but "not identical

to" Sherman Act; Sherman Act cases are inapposite where Oklahoma law is different), *cert. denied*, 519 U.S. 928 (1996).

In a recent decision, the Oklahoma Supreme Court underscored how Oklahoma antitrust law differs from federal antitrust law. In *Fine Airport Parking, Inc. v. City of Tulsa*, 2003 OK 27, __ P.3d __ (2003) (not yet released for publication) Resp. App. 1a, the court held that Oklahoma antitrust law does not incorporate the federal "state action doctrine," *id.* at 2a, thereby rejecting a major premise upon which SWBT urges this Court to grant certiorari. *Fine Airport* also explained that the elements of a restraint of trade claim under Oklahoma law are different from federal law. *Id.* at 6a n.5. Finally, *Fine Airport* poignantly noted that state antitrust laws – many of which aim to be consistent with federal antitrust law – differ in important ways. *Id.* at 10a-11a n.8.

In its effort to portray this case as worthy of this Court's attention, SWBT downplays (and in some cases, ignores) the significance of state law in the lower courts' decisions. For example, while SWBT admitted below that Oklahoma law "controls" as to damages, *Pet. for Reh. En Banc.*,13, it now relies on unique verbiage from a federal antitrust remedy statute that is not duplicated in Oklahoma's remedy statute. Pet. 20.

There are important reasons why this Court rarely exercises its certiorari jurisdiction to evaluate the correctness of a lower court's interpretation of state law or to correct fact-based errors – decisions on such matters have limited applicability (*i.e.*, primarily to the case at hand) and thus do not constitute an effective use of this Court's limited resources. *See Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (such review is highly exceptional); *Bishop v. Wood*, 426 U.S. 341, 346 (1976) (noting practice of deferring to lower courts on matters of state law); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938)

(conflict among circuits not reason for granting certiorari as to state law issue). Moreover, because "[s]tate courts are the principal expositors of state law," *Moore v. Sims*, 442 U.S. 415, 429 (1979), any decision by this Court interpreting state law could ultimately be overturned by the state's supreme court. *See id.* at 428 (federal court determination of state law "not binding on state courts and may be discredited at any time").

SWBT's contention that this Court should review the Tenth Circuit's interpretation of Oklahoma law because it discusses federal law is unavailing. Pet. 3 n.4. Notably, the two cases SWBT invokes for support are inapposite and underscore the rationale for denying its Petition. In *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138 (1984), this Court explained that it reviews federal questions considered by state courts -- such as whether a particular interpretation of state law would conflict with federal constitutional or statutory policies – if the question actually compelled (or failed to compel) the lower court's interpretation of state law. *Id.* at 152. Similarly, in *Merrill Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), this Court explained that it can review a federal issue – such as the proper interpretation of a federal regulation relevant to a tort claim – even if it arises in a state cause of action. *Id.* at 816. In neither case, nor any other case of which Plaintiffs are aware, has this Court reviewed a state law question merely because state law endeavors to be consistent with, but is not identical to, federal law.

II. BECAUSE THE FEDERAL STATE ACTION DOCTRINE DOES NOT APPLY UNDER OKLAHOMA LAW, THE QUESTION RAISED BY SWBT'S PETITION IS MOOT

Touting principles of "federalism" and "state sovereignty," SWBT asserts that the Tenth Circuit's application of the federal

"state action doctrine" to Plaintiffs' Oklahoma antitrust claims creates a federal circuit conflict and threatens "state sovereignty" by allowing federal courts to interfere with state regulatory policies. Pet. 12, 19-20. However, in *Fine Airport*, Resp. App. 1a, the Oklahoma Supreme Court recently held that the state action doctrine is *not* incorporated into and does *not* provide immunity under Oklahoma antitrust law. *Id.* at 2a. The court differentiated between a "preemption" defense like state action, which deals with laws of *two* sovereigns, and an "exemption" defense, which reconciles laws of a *single* sovereign. After finding that the state action doctrine, grounded in principles of federalism and state sovereignty, does not apply to Oklahoma antitrust claims, *id.* at 9a-10a, the court affirmed the result below applying an exemption defense. Finding that the state statute in question *expressly permitted* the city, acting as an arm of the state and for the public good, to engage in the specific conduct being challenged, the court held that the Oklahoma legislature intended to immunize that conduct from Oklahoma antitrust law. *Id.* at 14a, 17a-18a.

The *Fine Airport* decision forecloses SWBT's argument that the Tenth Circuit applied the state action doctrine in a manner that creates a circuit conflict, and affirms the District Court's identical post-trial finding that the doctrine was inapplicable under Oklahoma law. *1/31/01 D.Ct. Order*, App. 82a. The Tenth Circuit "decline[d] to address" whether the doctrine applied; instead, it assumed that it did and concurred with the District Court's trial finding that SWBT failed to prove its elements. *Telecor*, App. 24a; (SWBT-App 8330).

With its state action (preemption) argument now moot, SWBT may attempt to assert an exemption (also called "express or implied immunity") argument. Its actions preclude it from doing so. First, SWBT's Petition alleges a conflict between the Tenth Circuit's and other federal circuits' application of *the state*

action doctrine. Pet. i. This Court's Rule 14.1(a) prevents review of a different issue. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 28 (1993) (refusing to review question not presented in petition). Second, the Tenth Circuit did not consider the exemption issue and this Court's general practice is not to review issues not raised or decided below. *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983) (federal question must be raised or decided below to be considered). Third, although an exemption defense was available to it under Oklahoma and federal law,[3] SWBT failed to include such a defense in the Pretrial Order as required by Fed. R. Civ. P. 16(e). Finally, SWBT *expressly disavowed* an exemption defense before the Tenth Circuit,[4] no doubt because of the difficulty of proving it.[5]

SWBT's claim for regulatory displacement of antitrust liability cannot even satisfy the requirements of the federal state

3. To reconcile two conflicting state statutes, *Fine Airport* applied the long-standing rule of statutory construction, "to ascertain and give effect to the legislative intent." *Fine Airport*, Resp. App. 14a-15a. As explained in M. Handler, *Antitrust*, 78 Colum. L. Rev. 1363, 1378 (1978), cited in *Fine Airport*, the exemption defense under federal law (express or implied immunity) also reconciles statutes by giving effect to legislative intent.

4. Plaintiffs advised the Tenth Circuit that SWBT's failure to raise implied immunity below precluded its assertion on appeal. *Appellees' Resp.*, at 57. SWBT responded that implied immunity had "nothing to do" with its state action defense. *Appellant's Reply*, at 19 n.21.

5. Exemption immunity is harder to prove than state action immunity because "there is a presumption in favor of antitrust and against implied repeals in the case of exemptions." Handler, *supra* note 3, at 1380; *see also United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719 (1975) (implied immunity requires "convincing showing" of "clear repugnancy" between antitrust laws and regulatory system).

action doctrine, let alone the more demanding requirements of an exemption (implied immunity) defense. As both lower courts found, Oklahoma did not have a clearly articulated state policy to displace competition with regulation (the first prong of the state action doctrine). To the contrary, it was *undisputed below* that state policy mandated payphone competition:[6]

> In July 1990 the Oklahoma legislature superseded the OCC's "sole supplier" policy by enacting Okla. Stat. tit. 17, § 139.1. Section 139.1 mandated that the OCC allow payphone competition in the territories of local exchange telephone companies as SWBT.

(SWBT-App 2085, 4612).

The evidence below proved that SWBT's private anticompetitive conduct was undertaken *outside* the regulatory scheme. *See* Counter-Statement, *infra* at 3-5. SWBT's own positions confirm this. Before the OCC, SWBT argued that the OCC had no "authority" over its payphone contracts. (SWBT-App 2092). Before the District Court, SWBT withdrew any defenses that Plaintiffs' claims against it were "subject in whole or in part to the jurisdiction of the OCC" or the Federal Communications Commission. (TEL-SApp 0005-06).

---

6. The foreseeable result of the state's pro-competition policy could not have been the OCC's approval of SWBT's conduct designed "to stymie that competition." *Telecor,* App. 25a. Rather, the "foreseeable result" of a statute that "promotes competition" is that parties "will compete, not that they will preclude competition." *Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 403 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992). None of the supposedly conflicting cases cited by SWBT involve a state policy that *expressly mandated competition.* Pet.12 n.6. Those cases are distinguishable. It was necessary therein to use a "foreseeability" analysis to determine the state's competition policy.

The Tenth Circuit found that SWBT's contractual lockup and Blitz were not "regulated," "mandated," "authorized," "endors[ed]," "reviewed," or even "known" by the OCC. *Telecor*, App. 25a n.7, 26a.

Nor did the OCC exercise "ultimate control" over SWBT's anticompetitive conduct (required to prove the active supervision prong of the state action doctrine).[7] *Id.* at 25a. SWBT's assertion that the OCC was aware and approved of its anticompetitive activities by considering the "fresh look" rule during the payphone rulemaking proceeding is wrong as a factual matter.[8]

---

7. SWBT asserts a circuit conflict based upon the holding in *TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir.), *modified on reh'g*, 86 F.3d 1028 (1986), that a regulatory agency's "power" to review challenged conduct is sufficient to prove active supervision even absent knowledge of the challenged conduct. The language SWBT quotes was *affirmatively deleted* from the opinion on rehearing, and was replaced with language reflecting the actual exercise of supervision. *See TEC Cogeneration*, 86 F.3d at 1028. The Tenth Circuit's finding is consistent with the holding in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992), that active state supervision means "active supervision *in fact*."

8. Contrary to the dissent's view of the OCC transcript (which the majority did not allow in the record), neither the OCC, the attorney general, nor competitors knew the scope of SWBT's contractual lockup:

> [P]art of the difficulty is that there is no evidentiary record in this proceeding as to what actions the incumbent LECs have taken. **We don't know if they have suddenly stepped up their efforts to renegotiate these contracts**, if they have posed new additional terms. Maybe they're going out and negotiating longer terms. **We don't know. There's no evidence**.

SWBT Add. to Brief, Tab 11, at 23 (emphasis added).

Faced with a lack of information, no evidentiary record, and vehement objections to its authority, the OCC chose not to act on the proposed "fresh look" rule. *Telecor*, App. 26a. The Tenth Circuit concluded that "[t]he OCC 's refusal to impose the fresh look does not imply that it was endorsing Southwestern Bell's lock-up campaign" but instead "the record suggests that the OCC's ignorance of the lock-up campaign's scope may have contributed to its decision not to impose the fresh look." *Id.* State action immunity is not conferred on regulated parties based merely on a regulatory agency's knowledge or "inaction." *See Phonetele, Inc. v. AT&T*, 664 F.2d 716, 736 (9th Cir. 1981) (state agency did not "embrace" tariff by refusing to strike it down), *cert. denied*, 459 U.S. 1145 (1983).[9]

Finally, this Court should not review this issue since SWBT's other (non-contract) anticompetitive conduct supports liability. *See* Counter-Statement, *infra* at 5-6; *McCord v. Maguire*, 873 F.2d 1271, 1273-74 (9th Cir. 1989) (verdict upheld if supportable on any factual basis)

III. THE TENTH CIRCUIT'S DAMAGE DECISION APPLIES SETTLED LAW AND DOES NOT CREATE A CIRCUIT CONFLICT

SWBT's contention that the Tenth Circuit created a new rule of law permitting damages based on future misconduct misstates the record. The Tenth Circuit held that damages must be based on *past* misconduct and, after a factual analysis, concluded the damage awards *were* supported by SWBT's *past* misconduct. *Telecor*, App. 30a-31a. The lower courts' application of an agreed-upon legal standard to the record facts does not merit this Court's review.

9. The same is true in regard to implied immunity. *See Essential Comm. Systems, Inc. v.* AT&T, 610 F.2d 1114, 1124 (3rd Cir. 1979) (no implied immunity when agency "suspends its judgment [regarding challenged conduct] pending further study").

A. SWBT's Damage Argument Challenges Fact-Bound Conclusions of the Lower Courts

SWBT suggests that the lower courts erroneously decided that the law allows damages for harm arising from future misconduct. But as the Tenth Circuit made clear, "[b]oth parties agree[d] that, in an antitrust case, future damages may be recovered for past misconduct but not for future misconduct." *Id.* at 32a. Consequently, the district court instructed the jury to award damages based upon "defendant's *past unlawful conduct*" and not to award "purely speculative damages." *Id.* at 31a. This Court must presume that the jury followed that instruction. *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 604-05 (1985) (juries presumed to follow instructions and verdict must be upheld if there is plausible support for it).

Because neither lower court committed the error of law urged by SWBT, the only issue is whether they correctly concluded that a reasonable jury could find that SWBT's past misconduct caused harmful future effects. In rejecting SWBT's motion for new trial, the District Court explained that future effects arising from SWBT's past misconduct justified the damages awarded to Plaintiffs:

> Plaintiffs presented evidence demonstrating they suffered future damage due to the effect of [SWBT's] past conduct. . . . To reach the verdict, it was not necessary for the jury to assume [SWBT] would continue to act as it had before trial. Rather, even if [SWBT] immediately ceased all anticompetitive practices following the verdict, *the effects of its prior bad acts* would continue.

1/31/01 D.Ct. Order, App. 73a (emphasis added). The Tenth Circuit upheld the verdicts, noting that appellate courts must

not disturb damage awards "'unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts'." *Telecor*, App. 31a (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931)). Whether the lower courts correctly found that a reasonable jury could decide that SWBT's past misconduct had future effects is not worthy of this Court's review. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) (this Court does not generally review concurrent findings of fact by lower courts).

B. SWBT's Damage Argument Ignores Factual Grounds Supporting the Damage Awards

SWBT contends the jury awarded future damages and that such award was based solely on future enforcement of its contracts. This argument not only misstates the record and ignores other facts supporting the verdicts, it violates the well settled principle that a damage award should not be upset by speculating about how the jurors arrived at it. *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1228 (10th Cir. 2000) (verdict may be supported by any plausible interpretation of evidence). The jurors awarded damages, without specifying their past or future character, using general verdict forms agreed to by SWBT. (SWBT-App 3517-52, 8358-59). SWBT assumes these awards included a component of *future* damages, but because there was evidence which would support awards of *past* damages in amounts exceeding the verdicts, it is equally plausible that the awards do *not* contain such a component. (Tel-SApp 0258-60).

SWBT next assumes that the future enforcement of its Location Owner contracts is the only conduct that could cause future injury. But this flies in the face of *abundant evidence* that the effects of SWBT's past misconduct would invariably

continue beyond trial. Putting aside that the future existence and impact of SWBT's anticompetitive contracts was a "fact" that even SWBT assumed in its damage model (SWBT-App 8157-58), SWBT's "abundance of other anticompetitive conduct" also gave rise to future harms. *Telecor*, App. 30a n.8. *See* Counter-Statement, *infra* at 5-7. Of particular importance is the evidence of future injury Plaintiffs suffered when their future growth rates were stunted by SWBT's past conduct. This undermined Plaintiffs' momentum and reputations in their start-up years and would continue handicapping them in the future (*e.g.*, depriving them of economies of scale/route density, and preventing them from securing key customers who would not consider competitors unless they had achieved minimum volumes of business). (SWBT-App 4310-11, 5248, 5851-52, 5921-22, 6901-02, 7196). As both lower courts noted, this future injury was *in addition to* the future harm caused by the existence of SWBT's contracts past trial. *Telecor*, App. 30a-31a ("Additionally, there was evidence of the business growth Plaintiffs would have experienced if allowed to enter a healthy market when it was newly opened if not for [SWBT's] conduct.").

Finally, during the years prior to trial SWBT used its predatory conduct to stop Plaintiffs from installing 1,863 payphones, each of which meant a lost long-term contract with the Location Owner. Once the fact of their injury was proven, Plaintiffs were only required to present a reasonable estimate of their damages. *Story Parchment*, 282 U.S. at 562-63. The jury could have found that Plaintiffs' inability to install those 1,863 payphones resulted in future lost profits for the term of *Plaintiffs' contracts*, thus supporting the verdicts without regard to the future enforcement of *SWBT's*

contracts.[10] (TEL-SApp 0513, 0515; SWBT-App 6907-10, 6930-31, 7558-59).

C. The Tenth Circuit's Decision Is Not in Conflict with Other Circuits

SWBT argues the Tenth Circuit's decision conflicts with holdings of other circuits that damages cannot be based upon speculative future misconduct. Because the Tenth Circuit clearly held that damages could not be recovered for future misconduct, there is no conflict, and the different results in the cases cited by SWBT stem from their particular facts. In *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 101 F.2d 79 (2nd Cir. 1939), and *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), any future damage was speculative because it depended *solely* upon anticompetitive conduct which would *necessarily occur, if at all, in the future.* Unlike this case, there was no contention or evidence of future harm caused by *past* conduct in those cases cited by SWBT.

In *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 745 F.2d 441 (7th Cir. 1984), the unusual nature of the anticompetitive scheme involved a contract between plaintiffs and defendants which the courts determined could be enforced in many situations without having anticompetitive effects. Future damages were thus speculative because the defendant's past acts (acquiring licensees and denying a plant location) could not legally give rise to a compensable injury *unless combined* with "other tricks,

---

10. Courts routinely affirm future damage awards based on anticipated length of business loss. *See Lightening Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1174 (3rd Cir. 1993) (future profits based on 10 year contract); *DeLong Equip. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1203-05 (11th Cir.) (future damages based on projected sales to customers), *cert. denied*, 510 U.S. 1012 (1993).

gambits and ploys" which *necessarily would occur, if at all, in the future. Id.* at 450. In this case, SWBT's *past conduct* was *itself* anticompetitive, legally compensable, and proven to have injured Plaintiffs beyond trial. *Telecor*, App. 30a-31a. SWBT's past conduct included using contracts with thousands of Location Owners (who were not parties below) to capture and lock-up the profitable payphone locations in the market. *Id.* at 30a, 33a. In short, because Plaintiffs felt the "adverse impact" of SWBT's contractual lock-up and other past conduct, they were entitled to recover all future damages flowing therefrom. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971). As in *Ohio-Sealy*, where it was unreasonable to assume Sealy would give back licensees acquired in the past, here there was no reason to assume, *or proof*, that SWBT would give back its captured locations. *See Central Telecomm, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 730-31 (8th Cir. 1986) (damages properly based on monopolist keeping franchise obtained through antitrust violation), *cert. denied*, 480 U.S. 910 (1987).

Without evidence or legal authority, SWBT argues that its thousands of contracts with Location Owners must be legally presumed to disappear or become unenforceable the day after trial, followed by an instantaneous return of a healthy, competitive market. But, as both lower courts noted, *factually* "[t]here was no suggestion or evidence at trial that [SWBT's] contracts would cease to exist or be terminated by [SWBT]," *Telecor*, App. 30a, or even that SWBT would "cease to enforce the contracts." *Id.* at 33a. SWBT's contracts extended beyond trial and contained automatic rollover provisions, causing the lower courts to conclude "they can last forever." *Id.* at 27a. Even SWBT's experts testified that SWBT's contracts would take the covered locations out of competition for the duration of the contracts. (SWBT-App 8306, 8131).

Nor is there a *legal* presumption that "lawful behavior extends to the forfeiture of existing contract rights." *Telecor*, App. 33a. The legal "enforceability" of SWBT's contracts after trial was never before the trial court nor could it have been "in the absence of the thousands of contracting third-party [L]ocation [O]wners." *Id.* Courts do not indulge the legal fiction that contracts disappear or that damages cannot be proven based on the future performance of existing contracts. *City of El Paso v. Darbyshire Steel Co., Inc.*, 575 F.2d 521, 523 (5th Cir. 1978) (antitrust damages provable when contract executed although contract performed into future), *cert. denied*, 439 U.S. 1121 (1979).

D. The Propriety of Injunctive Relief is Not Subject to Review

Persisting in its erroneous assumption that damages were awarded for future misconduct, SWBT claims "the jury was not entitled to award future damages" because the proper remedy was injunctive relief. Pet. 22. SWBT has waived this issue. SWBT admitted below that Plaintiffs could recover damages for "future impact of *past* conduct," SWBT 4/20/00 Memo, p. 11, and the jury was instructed to "calculate each plaintiffs' past and future lost profits." (SWBT-App 3510). SWBT never objected to that instruction on the ground that there was no evidence of future harm from *past* conduct. *See Jabat, Inc. v. Smith*, 201 F.3d 852, 857 (7th Cir. 2000) (permitting jury instructions on future damages waives later claim that future damages could not be awarded). SWBT also agreed to Plaintiffs' withdrawal of injunctive relief after trial. (SWBT-App 3553-54). Ordinarily, this Court will not decide questions not raised or litigated below especially where the party raising the issue "failed to object to a jury instruction . . . ." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987).

SWBT's suggestion that antitrust law gives equitable remedies preference over legal damages is unsupported and relies on an inapplicable federal statute.[11] Equity acts "only when legal remedies [are] inadequate," *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959), even when equitable relief is specifically requested. *See DSC Comm. Corp. v. Next Level Comm.*, 107 F.3d 322, 328 (5th Cir. 1997) (future damage award precluded injunctive relief). Consequently, the Tenth Circuit properly concluded that damages were a reasonable way to eliminate the consequences of SWBT's conduct. *Telecor*, App. 35a. A private suit for treble damages "further[s] the overriding public policy in favor of competition." *Perma Life Muffler, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

IV. THE TENTH CIRCUIT'S DECISION AFFIRMING THE RELEVANT PRODUCT MARKET DEFINITION APPLIED SETTLED LAW TO UNDISPUTED FACTS

In its challenge to the Tenth Circuit's market definition analysis, SWBT tacitly concedes that this case involves the application of well-settled legal standards to undisputed facts. Indeed, SWBT alleges not that the Tenth Circuit's analysis creates a circuit conflict or ignores this Court's precedents, but that it is "*likely* to foster significant confusion and circuit conflict." Pet. i, 5 (emphasis added). That is an insufficient basis for this Court's review.

---

11. SWBT relies on verbiage in a federal statute ("against threatened loss") that is unlike Oklahoma's remedy statute. *Compare* 15 U.S.C. § 26 *with* Okla. Stat. tit. 79, § 205. Even under federal law the verbiage has no relevance here, since Plaintiffs' damages were based on past conduct.

A. The Product Market Was Properly Defined at the Location Owner Level

For over forty years, lower courts have applied the product market definition analysis set forth by this Court in its landmark *Brown Shoe* and *DuPont* cases that requires an empirical inquiry into what products are reasonably interchangeable. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325-26 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Telecor*, App. 9a-11a (applying interchangeability analysis). This flexible analysis requires courts to "recognize competition where, in fact, competition exists" in order to evaluate the effect of the alleged anticompetitive practice(s). *Brown Shoe*, 370 U.S. at 326.

In its Petition, SWBT claims payphone competition occurs at the "downstream" end user level. Pet. i. But, SWBT ignores the contrary testimony of its vice president:

> Q: From the standpoint of competitors in the pay phone service business, would you agree that the actual competition that [SWBT] experiences directly from its competitors would be at the level of the site location owners?
>
> A: Yes.

(SWBT-App 0163). Both lower courts found it undisputed that payphone competition occurs at the Location Owner level. *3/01/00 D. Ct. Order*, App. 54a; *Telecor*, App. 11a. Without access to Location Owners, who the Tenth Circuit recognized could be viewed as both *consumers* of payphone services and *suppliers* of payphone locations, *Telecor*, App. 12a, 18a-19a, competitors could not install payphones. (SWBT-App 0071).

The Tenth Circuit's *Brown Shoe/DuPont* analysis is consistent with this Court's admonition in *Mandeville Island*

Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948), that monopolization of a buyer's market – *i.e.*, monopsony power – can violate the antitrust laws: "the Sherman Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Id.* at 236. In a monopsony case, "reasonable interchangeability" under *Brown Shoe/DuPont* is viewed through the eyes of *suppliers*. *Todd v. Exxon Corp.*, 275 F.3d 191, 201-02 (2nd Cir. 2001). Similarly, in the case of an upstream seller's market – *i.e.*, monopoly power – interchangeability is viewed from the perspective of the upstream consumer. *Cass Student Advertising, Inc. v. National Educ. Advertising Serv., Inc.*, 516 F.2d 1092,1097-98 (7th Cir.) (market defined from perspective of college newspapers as upstream consumers), *cert. denied*, 423 U.S. 986 (1975). Viewing interchangeability through the eyes of Location Owners (whether as upstream consumers of payphone services or as suppliers of payphone locations), the Tenth Circuit found it undisputed that "from the Location Owners' perspective, cellular phone services and pay phone services are not interchangeable." *Telecor*, App. 19a.

SWBT does not challenge the Tenth Circuit's *Brown Shoe/DuPont* analysis. Instead, SWBT recasts the market structure in a manner that is contrary to the undisputed summary judgment facts.[12] Even putting aside this Court's aversion to reviewing factual determinations, SWBT's fact-based arguments were not raised below and are thus inappropriate for review. When a

12. SWBT labels Location Owners as "distributors," even though its expert said they are not. (SWBT-App 1876-77). SWBT falsely claims that the only sales in the payphone business are at the downstream level, even though sales occur at the Location Owner level in the form of commissions (public payphones) and fees (semi-public payphones). (SWBT-App 0158, 1451).

litigant fails to challenge certain facts upon which market definition depends and then offers a legal argument that assumes contrary facts, an appellate court has "no basis for upsetting the [district] court's decision . . . ." *United States v. Microsoft Corp.*, 253 F.3d 34, 52 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001). Finally, SWBT's undeveloped references to other issues – which are not raised by the question in its Petition, presented by the record, or preserved for appeal – should not be reviewed.[13] *Izumi*, 510 U.S. at 28; *Kibbe*, 480 U.S. at 259.

As the summary judgment record reveals, the undisputed legal issue before the court was whether SWBT's conduct substantially foreclosed competitors' access to Location Owner customers. (SWBT-App 0072-75, 1230). Aside from creating entry barriers for competitors, SWBT was accused of harming Location Owners by foreclosing their ability to choose competitors who offered them better service, more technologically advanced payphones, and better rates. (SWBT-App. 0072-75). In particular, by controlling the price at the Location Owner level – where SWBT was paying non-competitive commissions on public payphones and charging

---

13. SWBT falsely states it was precluded from offering evidence of the *alleged* impact that cell phone usage had on the payphone market. Pet. 29 n.14. SWBT offered such evidence, prompting the district court to note "that's been a contention from the beginning of this trial." (SWBT-App 6607-10, 8191-94, 8320). SWBT falsely implies the relevant market instruction confused jurors about where to look for injury in that market. Pet. 29 n.14. The jury was *not* confused. Both parties' counsel and experts, as well as *other jury instructions*, directed jurors to the Location Owner level. (SWBT-App 6298, 6513, 8438). As SWBT's counsel and economist told the jury, "the market in this case [is] the market for provision of payphone service, both public and semi-public, to [L]ocation [O]wners. . . ." (SWBT-App 8183). In any event, as the Tenth Circuit noted, SWBT waived any objection to the market definition instruction by agreeing to it. *Telecor*, App. 5a.

supra-competitive fees for semi-public payphone service – SWBT was accused of maintaining its monopoly and reaping monopoly profits in that market. (SWBT-App 0330, 6441-42).

The cases SWBT cites reveal how dramatically its legal argument veers from market definition, and how reliant it is upon portraying the market structure contrary to the undisputed facts. SWBT cites *Omega Envt. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), *Roland Mach. Co. v. Dresser Indust., Inc.*, 749 F.2d 380 (7th Cir. 1984), and *Microsoft*, 253 F.3d at 34. These cases address the sufficiency of a plaintiff's proof of liability after the market is defined, not the market definition standard. Moreover, none involve the issue here – whether a market may be defined at a level other than the ultimate consumer level. The cited cases defined the market at the ultimate consumer level because competition occurred at that level. Thus, SWBT has not identified a conflict with the Tenth Circuit's decision defining the market at the Location Owner level, where it was undisputed that competition occurred.[14]

B. The Tenth Circuit's Decision Is Consistent with the Settled Principle that Antitrust Law Protects the *Competitive Process*, Not Particular Market Participants

Plaintiffs proved the only anticompetitive effects they were required to prove under the jury instructions in this case – injury to competition in the *relevant* market (at the Location Owner

14. Without identifying them as "conflicting" cases, SWBT cites *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed Cir. 1999) and *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216 (2nd Cir. 1999). *AD/SAT* involved the unique requirements for "monopoly leveraging," a claim not at issue here. *Integraph*, which addresses a plaintiff's failure to show that competition occurred between itself and the defendant in *any* market, *id.* at 1354-55, confirms that the Tenth Circuit properly focused on the market in which *Plaintiffs and SWBT competed.*

level).[15] Although it never objected to those jury instructions, SWBT urges this Court to adopt a new rule for monopolization claims involving an input or upstream market.

Without support from either this Court or the circuit courts, SWBT calls for a change from the current approach which requires proof of injury to competition in the *relevant* market, to an approach that would also require proof of injury to competition in a downstream ultimate consumer market if the *relevant* market is defined upstream. While this argument poses a question not presented by the facts of this case – since Plaintiffs also proved harm to the ultimate consumers of payphones[16] – it ignores the fact that the goal of the antitrust laws is protection of the *competitive process*, not a particular market participant. *Brown Shoe,* 370 U.S. at 320 (antitrust laws were enacted to protect "*competition*, not *competitors*"). This Court has consistently held that antitrust laws condemn anticompetitive practices which injure competition, without regard to market

---

15. In the Pretrial Order, SWBT agreed that the relevant product market was defined at the Location Owner level, and the case was thereafter tried on that basis. (SWBT-App 2157,6298, 8183). Under the jury instructions agreed to by SWBT, the only injury to competition that Plaintiffs were required to prove was in this relevant market. (SWBT-App 3479). For example, to determine if SWBT had monopoly power, jurors were directed to consider the competitiveness of commissions paid by SWBT to Location Owners. (SWBT-App 3471). Plaintiffs proved their exclusion from this relevant market, *Telecor*, App. 4a, and that Location Owners thereby suffered from non-competitive commissions, and from inferior quality payphones. *Id.*

16. As the Tenth Circuit noted, Plaintiffs proved injury flowing from SWBT's exclusionary conduct, not only to the relevant customers (Location Owners), but also to payphone end-users who suffered from inferior quality payphones, lack of choice, and higher call rates. *Telecor*, App. 4a; (SWBT-App 5856-59, 4045).

level. *Mandeville,* 334 U.S. at 235-36 (condemning price fixing conspiracy by purchasers that impacted sellers of sugar).[17]

In the years since this Court decided *Mandeville*, numerous courts and commentators have reiterated that the antitrust laws provide a remedy for monopsony and competitive injury to input or upstream markets. As Judge Wald summarized, "restraints on input markets can be as destructive of a free market economy (and therefore ultimately damaging to consumers) as restraints on output markets. . . . So, even proceeding from the premise that the antitrust laws aim only at protecting consumers, monopsonies fall under antitrust purview. . . ." *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting), *aff'd*, 518 U.S. 231 (1996). *See Todd*, 275 F.3d at 202 (proper market was one in which interchangeability was viewed from perspective of seller, not consumer); *Alexander v. National Farmers Org., Inc.*, 687 F.2d 1173, 1193 (8th Cir. 1982) (predatory conduct found in upstream marketing of raw milk), *cert. denied*, 461 U.S. 937 (1983); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1292, 1306 n.12 (9th Cir.) (franchise [input] market defined although ultimate sales were to consumers and there was no showing of effect on consumer price), *cert. denied*, 459 U.S. 1009 (1982); HERBERT HOVEMKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 16 (1999) ("monopsony . . . is just as inconsistent with consumer welfare as monopoly").

In none of the cases involving anticompetitive practices directed at input sellers and at upstream consumers have courts

17. *See also American Tobacco Co. v. United States*, 328 U.S. 781, 803-04 (1946) (applying antitrust law to restraints on input market for tobacco); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (agreements to purchase inputs at or under market are species of price-fixing); *Swift & Co. v. United States,* 196 U.S. 375, 394 (1905) (applying antitrust law to restraint on livestock inputs).

required plaintiffs to prove not only injury to competition in that relevant market, but also in an end-user market. *See, e.g., Mandeville*, 334 U.S. at 247-48 (Jackson, J., dissenting) (explaining that majority opinion held monopsony claim valid even though it did not specify injury to end users). SWBT's reliance on *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261 (7th Cir. 1984), for the proposition that ultimate consumer harm must be shown is misplaced. The Seventh Circuit later rejected such a rule in *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986), finding no case in which this Court has required plaintiffs to "articulate how the welfare of the ultimate consumer has been diminished by an injury to competition at *another* level." *Id.* at 536.

C. The Petition's Undeveloped Antitrust Injury Argument Does Not Merit Review

SWBT's Petition contains a number of references to the question of "antitrust injury" and implies that Plaintiffs failed to meet this requirement. Pet. 24, 29. As this Court explained in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), "[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 489. The antitrust injury requirement is related to, but distinct from, the more general requirement of "antitrust standing." *See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-44 (1983) (setting out multi-factor test for antitrust standing).

Given that SWBT did not raise antitrust injury or antitrust standing before the Tenth Circuit, it is not surprising that neither the majority nor dissenting opinions even allude to these

requirements. For this and a variety of other reasons, SWBT failed to preserve the issue for this Court's review.[18]

Without a more clearly framed issue for review and a developed discussion below, it is hard to identify SWBT's argument. However, it appears SWBT's complaint is that Plaintiffs were not the proper parties to challenge its anticompetitive conduct in this case. Pet. 24, 28 n.13. As competitors who were the intended victims of SWBT's predatory conduct (aimed at excluding Plaintiffs and other competitors from the relevant market), Plaintiffs suffered precisely "the type of loss that the claimed violations . . . would be likely to cause," and thus could bring an antitrust claim. *Pueblo Bowl-O-Mat*, 429 U.S. at 489. A showing of antitrust injury and "the case for relief will be strongest where competition has been diminished." *Id.* at n.14. *See also* 2 Areeda, Hovencamp, & Blair, ANTITRUST LAW ¶ 348d1, at 392 (2000) ("Standing is clear and seldom challenged when the plaintiff alleges that its rival engaged in an exclusionary practice designed to rid the market of the plaintiff . . . so that the defendant could maintain or create a monopoly."). Plaintiffs' standing as excluded competitors is also clear under Oklahoma monopoly law which permits liability based *solely* on the defendant's power to "exclude competition." App., 103a.

---

18. Issues not pressed or passed upon below are generally not reviewed by this Court. *Gates*, 462 U.S. at 218 n.1. SWBT not only failed to file any Rule 50 motion at trial testing Plaintiffs' proof of antitrust injury, it admitted that Plaintiffs suffered such injury by presenting a damage model at trial which awarded damages using the same methodology as Plaintiffs (*i.e.*, lost payphones and associated revenues as a result of SWBT's conduct). (SWBT-App. 8129). SWBT also did not object to the jury instructions which allowed jurors to find, as they did find, that "damage flowed to [Plaintiffs] as a result defendant's antitrust violations." (SWBT-App 3507). *See Kibbe*, 480 U.S. at 259 (no review justified where petitioner failed to object to jury instructions).

Plaintiffs' injury (inability to place payphones) was caused by having been excluded from the relevant (Location Owner) market and was measured by their lost share of that market (*e.g.* lost payphones). (SWBT-App 6443-44, 6966). Once the fact of injury was shown, damages could be calculated in any reasonable fashion. *Story Parchment,* 282 U.S. at 562-63. That Plaintiffs' damages were calculated by considering past and future lost profits they would have earned from lost payphones in the relevant market is appropriate, unremarkable, and does not alter the direct link between Plaintiffs' injuries and SWBT's anticompetitive conduct. *See National Farmer's Org. v. Associated Milk Producers, Inc.,* 850 F.2d 1286, 1293. n.4 (8th Cir. 1988) (farmer's organization impaired from competing in milk sales market suffered "antitrust injury" from lost market penetration, and could measure damages by lost membership dues and checkoff fees), *cert. denied*, 489 U.S. 1081 (1989).

SWBT's conduct that excluded Plaintiffs from the market is the same conduct that injured competition by depriving Location Owners of the ability to choose competitors' superior payphones and payphone services.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT D. EDINGER
Counsel of Record
JONATHAN E. MILLER
LINDA G. KAUFMANN
EDINGER & BLAKLEY, P.C.
Attorneys for Respondents
Suite 3150, Oklahoma Tower
210 Park Avenue
Oklahoma City, OK 73102
(405) 232-3300